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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1951

No. 173

JOSEPH T. LYKES, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 5, 1951.

CERTIORARI GRANTED OCTOBER 8, 1951.

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCT. 22, 1951.

—7875

[fol. 1] [Caption omitted]

[fol. 2]

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA, TAMPA DIVISION

No. 1556-Civ-T

JOSEPH T. LYKES, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant

COMPLAINT

The plaintiff, Joseph T. Lykes, by his undersigned attorney presents this his complaint against the United States of America pursuant to the provisions of Section 24(20) of the Judicial Code as amended (28 USCA 41(20)) and alleges as follows:

1. The plaintiff, Joseph T. Lykes, resides at 1040 El Dorado, City of Clearwater, in the County of Pinellas, State of Florida.

2. This is a suit for the recovery of federal income taxes overpaid by the plaintiff for the calendar year 1944 in the amount of $5,645.78, plus interest.

3. Taxpayer filed on January 13, 1945, an income tax return on Form 1040 for the taxpayer's taxable year 1944, that being the calendar year 1944, that return showing a tax payable in the amount of $34,782.91, which amount the taxpayer paid in the following manner:

[fol. 3]

By payments on 1944 Declaration of Estimated Tax	$ 1,929.42
By payroll deductions	4,554.40
By payment Jan. 13, 1945	28,299.09
	$34,782.91

All payments thereupon being made by or before January 13, 1945.

4. That return of the taxpayer failed to include as a deduction an amount of $7,263.83, which was paid on August

30, 1944, to Kenneth I. McKay, attorney at law, Tampa, Florida, for legal services and advice in connection with contested deficiencies assessed by the Commissioner of Internal Revenue on gifts made by the taxpayer and included in the taxpayer's gift tax return for the year 1940.

5. The exclusion of the foregoing deduction was inadvertent, and the taxpayer contended and contends that it is a proper deduction under the provisions of the Internal Revenue Code, Section 23(a)(2). The gifts made were of shares of stock in a corporation in which the taxpayer was a principal stockholder. They represented a part of the shares which he held in that corporation, which holdings were his major investment. He had himself spent his life in the service of that corporation. It was a part of the purpose of the gift to obtain, by parting with such shares, an interest in the operation of the business among, generally, younger members of the taxpayer's family so as to increase or maintain the potential value of the remaining shares held by the taxpayer and the income which they would produce. Further, the dispute concerning the gift tax consisted of a disagreement between the government and the taxpayer about the value of the shares given; and conse-
[fol. 4] quently, the decision affected the value of the shares retained and the ability of the taxpayer to proceed further in his plan of giving; and further, it affected his ability to protect that property against unjust intangible personal property taxes which might be assessed by the State of Florida or other states; and, moreover, involved other problems faced by the taxpayer concerning the conservation and maintenance of his remaining property because of the unfair valuations for which the Commissioner of Internal Revenue was contending in that gift tax controversy. Further, the claim of the government under which it threatened to file a deficiency assessment was so obviously exorbitant and ill-founded that the deficiency determined by the Commissioner to aggregate $145,276.50 was settled under stipulation before the Tax Court of the United States, without trial, for the amount of $15,612.75; and it is therefore apparent that if the taxpayer's interests had not been protected by proceedings in the Tax Court, taxpayer would have had to pay a considerable tax which was not due. In order

to pay such a tax, taxpayer would have had to dispose of property which he held for the production of income, which property, if disposed of by the taxpayer, could not have been conveniently replaced with property of like value.

6. The deduction of $7,263.83 increases the taxpayer's allowable deductions for the taxable year 1944 from $4,452.26 to $11,716.09; and, as shown by the comparative tax calculations of Exhibit A attached, this reduces the income tax for the year 1944 from the amount paid of $34,782.91 to an amount of $29,117.13, showing an overpayment of the income tax for that year of $5,665.78, which amount it is claimed by the taxpayer should be refunded.

7. The taxpayer executed and filed a claim for refund with the Collector of Internal Revenue at the Custom House [fol. 5] in New York City, New York 4, N. Y., on the 9th day of March, 1946, which claim was received by the Collector of Internal Revenue on or about that day.

8. There was forwarded to the taxpayer by registered mail under date of February 16, 1948, a notice of disallowance in full of the claim filed, given by the direction of the Commissioner, by E. J. McLarney, Deputy Commissioner.

9. A true copy of the claim for refund is attached as Exhibit B, and a copy of the notice of disallowance given by registered mail is attached as Exhibit C.

Wherefore, the Plaintiff prays that judgment may be entered herein in favor of the plaintiff and against the defendant for $5,665.78, plus interest at 6% per annum, together with costs of suit, and for such other and further relief as to this Court may seem meet.

Chester H. Ferguson, George W. Ericksen, Attorneys for Plaintiff, Address: 215 Madison Street, (P.O. Box 1531), Tampa, Florida.

Of Counsel: MacFarlane, Ferguson, Allison & Kelly.

[fol. 6] EXHIBIT "A"

1944

COMPARATIVE TAX CALCULATIONS

	Tax Calculation on Taxpayer's return	Tax Calculation on Corrected Income after deduction of $5,665.78 not included in return
Adjusted gross income	$63,238.05	$63,238.05
Less: Deductions	4,452.26	11,716.09
Net income	58,785.79	51,521.96
Surtax exemptions	500.00	500.00
Taxable net income—surtax	58,285.79	51,021.96
Surtax	33,034.34	27,586.47
Normal Tax		
Net income	58,785.79	51,521.96
Normal tax Exemption	500.00	500.00
Taxable Net Income—Normal Tax	58,285.79	51,021.96
Normal Tax	1,748.57	1,530.66
Total Tax	34,782.91	29,117.13

Overpayment: $34,782.91 less $29,117.13, or $5,665.78

(Here follow 3 Photolithographs, side folios 7, 8, 9-10)

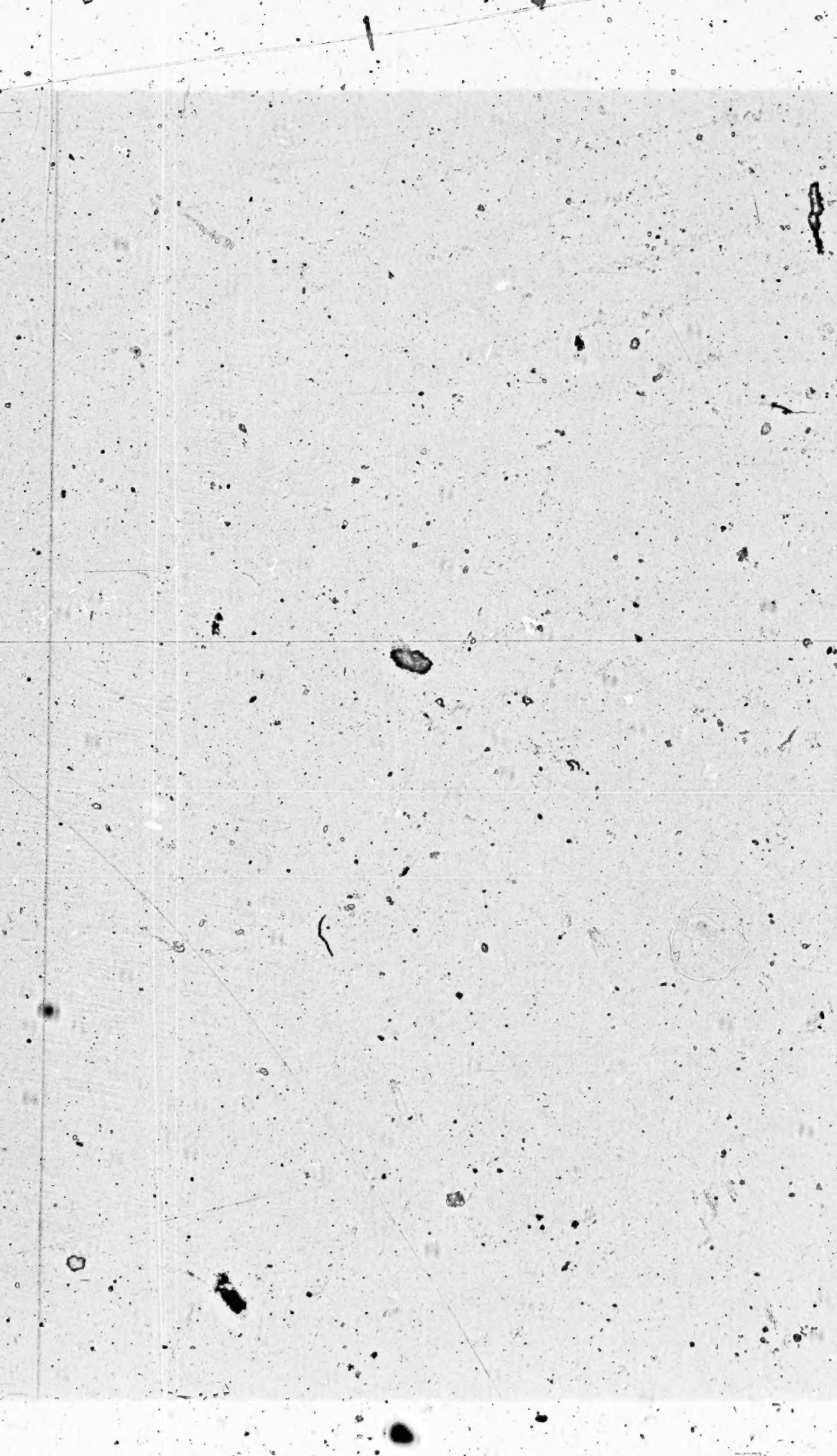

EXHIBIT "B"

Form 843
TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
(Revised Oct. 1945)

CLAIM

TO BE FILED WITH THE COLLECTOR WHERE ASSESSMENT WAS MADE OR TAX PAID

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse.

COLLECTOR'S STAMP
(Date received)

[X] REFUND OF TAXES ILLEGALLY ~~ERRONEOUSLY, OR EXCESSIVELY~~ COLLECTED.

[ ] REFUND OF AMOUNT PAID FOR STAMPS UNUSED, OR USED IN ERROR OR EXCESS.

[ ] ABATEMENT OF TAX ASSESSED (not applicable to estate, gift, or income taxes).

STATE OF New York }
COUNTY OF New York } ss:

TYPE OR PRINT

Name of taxpayer or purchaser of stamps JOSEPH T. LYKES

Business address 17 Battery Place (Street) New York (City or town, postal zone number) New York (State)

Residence 631 Esplanade, Pelham Manor, New York

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed 2nd Dist. Int. Rev. House, New York City
2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from Jan. 1, 1944, to Dec. 31, 1944
3. Character of assessment or tax Income Tax
4. Amount of assessment, $ 34,782.91; dates of payment see statement attached
5. Date stamps were purchased from the Government
6. Amount to be refunded $ 5,665.78
7. Amount to be abated (not applicable to income, gift, or estate taxes) $
8. The time within which this claim may be legally filed expires, under section 322 (b) of Revenue Act of 1938 (Revenue Act or Internal Revenue Code) on March 15, 1948

The deponent verily believes that this claim should be allowed for the following reasons:

In preparing his income tax return for the year 1944, taxpayer inadvertently omitted to include as a deduction on the return the amount of

EXHIBIT "B"

4B

File this return with Collector of Internal Revenue on or before March 15, 1945. Any balance of tax due (item 8, below) must be paid in full with return. See separate Instructions for filling out return.

Page 1

FORM 1040
Treasury Department
Internal Revenue Service

U. S. INDIVIDUAL INCOME TAX RETURN
FOR CALENDAR YEAR 1944

1944

or fiscal year beginning _____, 1944, and ending _____, 1945

Do not write in these spaces

File Code

Serial No.

District

(Cashier's Stamp)

EMPLOYEES.—Instead of this form, you may use your Withholding Receipt, Form W-2 (Rev.), as your return, if your total income was less than $5,000, consisting wholly of wages shown on Withholding Receipts or of such wages and not more than $100 of other wages, dividends, and interest.

NAME JOSEPH T. LYKES
(PLEASE PRINT. If this return is for a husband and wife, use both first names)

ADDRESS 631 Esplanade
(PLEASE PRINT. Street and number or rural route)

Pelham Manor, N. Y.
(City or town, postal zone number) (State)

Social Security No. (if any) 060-10-4389

Your Exemptions

1. List your own name. If married and your wife (or husband) had no income, or if this is a joint return of husband and wife, list name of your wife (or husband). List names of other close relatives with 1944 incomes of less than $500 who received more than one-half of their support from you. If this is a joint return of husband and wife, list dependent relatives of both.

NAME (Please print)	Relationship	NAME (Please print)	Relationship
Your name	x x x x x x x x x		

Your Income

2. Enter your total wages, salaries, bonuses, commissions, and other compensation received in 1944, BEFORE PAY-ROLL DEDUCTIONS for taxes, dues, insurance, bonds, etc. Members of armed forces and persons claiming traveling or reimbursed expenses, see Instruction 2.

PRINT EMPLOYER'S NAME	WHERE EMPLOYED (CITY AND STATE)	AMOUNT	
Lykes Bros. Co., Inc.	New York City, N.Y.	$ 24,000	00

Enter total here → $ 24,000 00

Do not use this page if r income is wholly from salaries, wages, div ds, and interest

Schedule A.—INCOME FROM ANNUITIES OR PENSIONS

1. Cost of annuity (total amount you paid in)	$	4. Total amount received this year	$
2. Amount received tax-free in prior years		5. Excess, if any, of line 4 over line 3	
3. Remainder of your cost (line 1 less line 2)	$	6. Enter line 5, or 3 percent of line 1, whichever is greater	$

Schedule B.—INCOME FROM RENTS AND ROYALTIES

1. Kind of property	2. Amount of rent or royalty	3. Depreciation or depletion (explain in Schedule F)	4. Repairs (explain in Schedule G)	5. Other expenses (itemize in Schedule G)
	$	$	$	$
Net profit (or loss) (col. 2 less sum of cols. 3, 4, and 5)	$	$	$	$

Schedule C.—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION. (Farmers should obtain Form 1040F)

(State (1) nature of business _____; (2) business name _____)

1. Total receipts _____ $

COST OF GOODS SOLD

(To be used where inventories are an income-determining factor)

(Enter the letters "C," or "C or M," on line 2 and 8 if inventories are valued at either cost, or cost or market whichever is lower)

2. Inventory at beginning of year	$	
3. Merchandise bought for sale		
4. Labor		
5. Material and supplies		
6. Other costs (explain in Schedule G)		
7. Total of lines 2 to 6	$	
8. Less inventory at end of year		
9. Net cost of goods sold (line 7 less line 8)	$	
10. Gross profit (line 1 less line 9)	$	

OTHER BUSINESS DEDUCTIONS

11. Salaries and wages not included as "Labor"	$	
12. Interest on business indebtedness		
13. Taxes on business and business property		
14. Losses (explain in Schedule G)		
15. Bad debts arising from sales or services		
16. Depreciation, obsolescence and depletion (explain in Schedule F)		
17. Rent, repairs, and other expenses (explain in Schedule G)		
18. Amortization of emergency facilities (attach statement)		
19. Net operating loss deduction (attach statement)		
20. Total of lines 11 to 19	$	
21. Total of lines 9 and 20	$	
22. Net profit (or loss) (line 1 less line 21)		

Schedule D.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS, ETC.

Do not itemize deductions if—(1) You determine your tax from the tax table on page 2, or
(2) Your total income is $5,000 or more and you claim the $500 standard deduction.
If husband and wife living together at end of year file separate returns and one itemizes deductions, the other must file his or her return on Form 1040, and must also itemize deductions.

Page 4

DEDUCTIONS

Describe deductions and state to whom paid. If more space is needed, list deductions on separate sheet of paper and attach to this return.

			Amount	
Contributions				
	See Attached List	736 50		
	Allowable Contributions (not in excess of 15 percent of item 5, page 1)		$ 736	50
Interest				
	Total Interest			
Taxes	Stock Transfer Stamps	$ 3 70		
	License Plates	39 00		
	N. Y. State Income Tax	3,006 11		
	Real Estate - Lots in Tampa	50 37		
	N.Y.C. Sales(est.) 30.Gasoline Tax			
	Total Taxes (Est.) 12.50	42 50	3,141	68
Losses from fire, storm, shipwreck, or other casualty, or theft				
	Total Allowable Losses (not compensated by insurance or otherwise)			
Medical and dental expenses				
	Net Expenses (not compensated by insurance or otherwise)			
	Enter 5 percent of item 5, page 1, and subtract from Net Expenses			
	Allowable Medical and Dental Expenses. See Instruction for limitation			
Miscellaneous	Solicitation Exp. directly relating			

expenses

[fol. 11] JOSEPH T. LYKES

Statement attached to and made part of claim for refund of income tax overpaid for the year 1944, form 843

The taxpayer filed, on Jan. 13, 1945, form 1040 for the taxable year 1944 and paid the full amount of the tax shown thereon as follows:

By payments on 1944 Declaration of Estimated Tax	$ 1,929.42
By payroll deductions	4,554.40
By payment Jan. 13, 1945	28,299.09
	$34,782.91

In preparing said return, the taxpayer inadvertently failed to include therein as a deduction under the provisions of Section 23(a)(2) of the Internal Revenue Code as amended the sum of $7,263.83 paid on Aug. 30, 1944 to Kenneth I. McKay, attorney at law, Tampa, Florida, for legal services and advice in connection with contesting deficiencies assessed by the Commissioner of Internal Revenue on gifts made by the taxpayer and included in his gift tax return for the year 1940.

Tax shown on Income Tax return for the year 1944 and paid as above scheduled	$34,782.91
Tax shown on amended 1944 Income Tax return attached hereto	29,117.13
Amount of overpayment of Income tax for the year 1944 to be refunded	$ 5,665.78

[fol. 12] The taxpayer believes that the case of Howard E. Cammack vs. Commissioner of Internal Revenue and Edward Arthur Cammack vs. Commissioner of Internal Revenue 5 T.C. 467, which held that legal fees paid were deductible under section 23(a)(2) I.R.C., is directly in point and is identical with facts existing in the instant case. For Commissioner's acquiescence, see Internal Revenue Bulletin, September 25, 1945, No. 18. To the same end, see

Louis E. Stodard, Jr., vs. Commissioner, C.C.A. 2, December 3, 1945. Both cases cite the decision of the U. S. Supreme Court in the case Trust u/w of Mary Lily (Flagler) Bingham, Messrs. William R. Kenan, Jr. and Lawrence C. Haines, Petitioners vs. Commissioner of Internal Revenue.

Signed, —— ——, Taxpayer.

Sworn to and subscribed before me this 9th day of March, 1946. —— ——.

[fol. 13] Copy

SALE OF 501 MANOR LANE HOUSE SEPT. 26, 1942 FRAME DWELLING HOUSE, PELHAM MANOR, N. Y.

Bought in 1919—Cost of building $18,000.00—Cost of Lane, $3,000.00—Total $21,000.00		
(Appraised by Internal Revenue Dept. 1932)		$21,000.00
Less: Depreciation 3% of $18,000.00 for 10 years	$5400.00	
1/1 to 9/26/22—269/365th of $540.00	397.00	5,797.97
Adjusted basis		15,202.03
Selling price—Less Expense of Sale		7,571.60
Corrected loss on sale of capital assets		7,630.43
Loss to be taken into account (50% of $7,630.43)		3,815.21
Loss allowed in 1942 tax report		1,000.00
Loss allowed in 1943 tax report		1,000.00
Loss allowed in this, 1944 tax report		1,000.00

Note: The above form and figures copied from Internal Revenue Auditors audit of the 1943 tax return, see letter from 225 Broadway, Aug. 14, 1944, signed by C. A. Krigbaum, Auditor in charge.

[fol. 14] EXHIBIT "C" TO COMPLAINT

Treasury Department
Washington 25

Feb. 16, 1948

Joseph T. Lykes, 631 Esplanade, Pelham Manor, N. Y.

Dear Mr. Lykes:

In re: Claim for refund of $5,655.78 for the year 1944.

In accordance with the provisions of section 3772(a)(2) of the Internal Revenue Code, this notice of disallowance in full of your claim or claims is hereby given by registered mail.

By direction of the Commissioner:

Yours very truly, (S.) E. J. McLarney, Deputy Commissioner

cc EGN CHF

[fol. 15] IN UNITED STATES DISTRICT COURT

On the 8th day of October, 1948, was filed Defendant's Answer in the following words and figures to-wit:

ANSWER—Filed October 8, 1948

The defendant answers the complaint herein, as follows:

I

The allegations in paragraph 1 are admitted.

II

The allegations in paragraph 2 are admitted, except that it is denied that the federal income taxes, for the recovery of which this suit is brought, were overpaid.

III

The allegations in paragraph 3 are denied, but it is admitted that on January 27, 1945, the plaintiff filed an income tax return for the taxable year 1944 in which he re-

ported a tax of $34,782.91; that on January 27, 1945, the plaintiff paid $28,299.09; and that the remainder of said tax was paid on declaration of estimated tax or withheld from plaintiff's wages or salaries.

IV

The allegations in paragraph 4 are denied, except that it is admitted that plaintiff's income tax return for 1944 did not include a deduction in the amount of $7,263.83 for legal services by Kenneth I. McKay.

V

The allegations in paragraph 5 are severally denied.

[fol. 16]

VI

The allegations in paragraph 6 are severally denied.

VII

The allegations in paragraph 7 are admitted, except that the date of the filing and receipt of the claim for refund is denied. The said claim for refund was filed and received on March 11, 1946.

VIII

The allegations in paragraph 8 are admitted.

IX

The allegations in paragraph 9 are admitted, except that the allegations set forth in Exhibit B to the complaint are denied.

Wherefore, defendant, having answered the complaint, demands judgment that plaintiff take nothing, that the complaint be dismissed on the merits, and that it be awarded its costs according to law.

H. S. Phillips, United States Attorney for the Defendant. Arthur L. Steed, Assistant United States Attorney.

On the 9th day of May, 1949, was filed Testimony on the Final Hearing in the following words and figures to-wit:

[fol. 17] IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 1556—Civ.-T.

Recovery Income Tax

Final Hearing

JOSEPH T. LYKES, Plaintiff,

vs.

THE UNITED STATES OF AMERICA, Defendant

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Exhibit No. 3	5
Exhibit No. 4	7
Exhibit No. 5, 6, 7, and 8	8

[fol. 18] IN UNITED STATES DISTRICT COURT

[Title omitted]

PROCEEDINGS ON FINAL HEARING—July 19, 1949

Appearances:

Chester Ferguson and George W. Ericksen, of Macfarlane, Ferguson, Allison & Kelly, Tampa, Florida, Attorneys for Plaintiff; and

Fred S. Gilbert, Special Assistant to the Attorney General, Washington, D. C., and

Arthur L. Steed, Assistant United States Attorney, Tampa, Florida.

COLLOQUY

By the Court: Do you have testimony to take in this case?

Mr. Ferguson: Yes sir, if your Honor please, some.

Mr. Ferguson: If your Honor please, we have our Comptroller here just to make a computation, and Mr. Lykes also will testify.

[fol. 19] The Court: I would like for you to state to me what the case is about.

Mr. Ferguson: This is a case of Joseph T. Lykes vs. The United States of America. If your Honor please, this is a suit against the United States based on a claim for refund filed and disallowed for the payment of attorneys fees, in which Mr. Lykes is claiming $5,665.78. The case arises out of the gift tax assertion, and the question involved is whether or not it is an allowable deduction under ordinary business expense.

By the Court: Attorneys' fees?

By Mr. Ferguson: Yes sir.

The Court: Does counsel for the Government desire to make any statement with reference to the defense to the action?

Mr. Gilbert: I don't believe we care to make any statement at this time, your Honor. It is purely a question of law, as we see it, as to whether or not attorneys' fees in a gift tax contest should be deductable from his income tax.

Mr. Ferguson: May it please the Court, in conference with Mr. Gilbert, of counsel for the Government, I think he has agreed to stipulate that:

STIPULATION

The plaintiff in this action, Mr. Joseph T. Lykes, business address 17 Battery Place, New York, New York, residence 631 Esplanade, Pelham Manor, New York, during the years involved, 1940-44, and now a resident of Florida, made gifts of one thousand shares of the Common Stock of Lykes Brothers, Incorporated, a Florida Corporation, with its

principal place of business in the City of Tampa, Florida, as follows:

[fol. 20] 250 shares of said stock to Margaret K. Lykes, his wife;

250 shares of said stock to Margaret Howell Lykes, his daughter;

250 shares of said stock to Elisabeth L. Lykes, his daughter; and

250 shares of said stock to Joseph T. Lykes, Jr.;

That Mr. Lykes filed his gift tax return for the year 1940, and returned the aforesaid gifts at the value of $120.00 a share, and paid the total tax of $13,032.75, as evidenced by the return herewith offered in evidence as Plaintiff's Exhibit No. 1.

By Mr. Gilbert: No objection.

(There being no objection thereto Plaintiff's exhibit No. 1 was filed in evidence.)

Mr. Ferguson:

That on March 3, 1944 the Government issued a ninety day notice by letter directed to plaintiff, and proposed a deficiency assessment against the plaintiff on account of the gifts previously mentioned in the sum of $145,276.50, urging that the value of the stock returned by plaintiff at $120.00 a share was of the value of $915.50, as is shown by a letter which we now offer in evidence as Plaintiff's Exhibit No. 2.

Mr. Gilbert: We have no objection.

(Thereupon the letter was filed in evidence as Plaintiff's Exhibit No. 2.)

Mr. Ferguson:

[fol. 21] That subsequently, on May 22nd, 1944, the plaintiff in this action, as Petitioner, filed a petition in the Tax Court of the United States, in defense of the above asserted or proposed deficiency assessment;

That pursuant to stipulation filed on December 19th, 1946, in the Tax Court of the United States, in the aforesaid cause, wherein the Plaintiff in this action was Petitioner in

on ....., 19..

The deponent verily believes that this claim should be allowed for the following reasons:

In preparing his income tax return for the year 1944, taxpayer inadvertently omitted to include as a deduction on the return the amount of $7,263.83 paid to Kenneth I. McKay, attorney at law, Tampa, Florida for legal services rendered in connection with deficiency assessments made by the Commissioner of Internal Revenue during 1944 on Gift Tax return of the taxpayer for the year 1940. The inclusion of this allowable deduction for the taxable year involved (1944) results in a tax of $22,633.31 instead of $28,299.09 as shown on the return originally filed, an overpayment of $5,665.78. See statement attached to and made part of this claim for refund as well as amended return (form 1040) for the year 1944.)

9

(Attach letter-size sheets if space is not sufficient)

Subscribed and sworn to before me this

9th day of March, 1946

Signed .....

.....

(Signature of officer administering oath)

.....

(Title)

(SEE INSTRUCTIONS ON REVERSE)

16—15804-8

4A

Your Income.

Lykes Bros. Co., Inc.	New York City, N.Y.	$ 24,000	00

Enter total here → $ 24,000 00

3. Enter here the total amount of your dividends and interest (including interest from Government obligations unless wholly exempt from taxation) — 39,848 05

4. If you received any other income, give details on page 3 and enter the total here

5. Add amounts in items 2, 3, and 4, and enter the total here — $ 63,238 05

If item 5 includes income of both husband and wife, show husband's income here, $; wife's income here, $

How to Figure Your Tax

IF YOUR INCOME WAS LESS THAN $5,000.—You may find your tax in the tax table on page 2. This table, which is provided by law, is based on the same tax rates as are used in the Tax Computation on page 4. The table automatically allows about 10 percent of your total income for charitable contributions, interest, taxes, casualty losses, medical expenses, and miscellaneous expenses. If your expenditures and losses of these classes amount to more than 10 percent, it will usually be to your advantage to itemize them and compute your tax on page 4.

IF YOUR INCOME WAS $5,000 OR MORE.—Disregard the tax table and compute your tax on page 4. You may either take a standard deduction of $500 or itemize your deductions, whichever is to your advantage.

HUSBAND AND WIFE.—If husband and wife file separate returns, and one itemizes deductions, the other must also itemize deductions.

Tax Due or Refund

6. Enter your tax from table on page 2, or from line 15, page 4 — $ 29,117 13

7. How much have you paid on your 1944 income tax?

(A) By withholding from your wages (Attach Withholding Receipts, Form W-2) — $ 4,554 40

(B) By payments on 1944 Declaration of Estimated Tax — 1,929 42

Enter total here → 6,483 82

8. If your tax (item 6) is larger than payments (item 7), enter BALANCE OF TAX DUE here — $ 22,633 31

9. If your payments (item 7) are larger than your tax (item 6), enter the OVERPAYMENT here — $

Check (✓) whether you want this overpayment: Refunded to you ☐; or Credited on your 1945 estimated tax ☐

If you filed a return for a prior year, what was the latest year? 1943

To which Collector's office was it sent? 2nd Dist. Custom House, N.Y.

To which Collector's office did you pay amount claimed in item 7 (B), above? " " " "

Is your wife (or husband) making a separate return for 1944? Yes

If "Yes," write below:

Name of wife (or husband) Mrs. Margaret K. Lykes

Collector's office to which sent Custom House, N. Y.

I declare under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signature of person (other than taxpayer or agent) preparing return) (Date)

(Name of firm or employer, if any)

(Signature of taxpayer) (Date)

(If this is a joint return of husband and wife, it must be signed by both)

(SEE TAX TABLE BELOW)

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line 8) ____ $ ____

10. Gross profit (line 1 less line 9) ____ $ ____

20. Total of lines 11 to 19 ____ $ ____

21. Total of lines 7 and 20 ____ $ ____

22. Net profit (or loss) (line 1 less line 21) ____

Schedule D.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS, ETC.

1. Net gain (or loss) from sale or exchange of capital assets (from separate Schedule D) ____

2. Net gain (or loss) from sale or exchange of property other than capital assets (from separate Schedule D) ____

Schedule E.—INCOME FROM PARTNERSHIPS, ESTATES AND TRUSTS, AND OTHER SOURCES

Name and address of partnership, syndicate, etc. ____ Amount, $ ____

Name and address of estate or trust ____ Amount, ____

Other sources (state nature) Directors Fees Amount, 390 CO

Total ____

Total income from above sources (Enter as item 4, page 1) ____ $ ____

Schedule F.—EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES B AND C

1. Kind of property (If buildings, state material of which constructed)	2. Date acquired	3. Cost or other basis (Do not include land or other nondepreciable property)	4. Assets fully depreciated in use at end of year	5. Depreciation allowed (or allowable) in prior years	6. Remaining cost or other basis to be recovered	7. Estimated life used in accumulating depreciation	8. Estimated remaining life from beginning of year	9. Depreciation allowable this year
					$			$

Schedule G.—EXPLANATION OF COLUMNS 4 AND 5 OF SCHEDULE B, AND LINES 6, 14, AND 17 OF SCHEDULE C

1. Column or Line No.	2. Explanation	3. Amount	1. Column or Line No.	2. Explanation	3. Amount
		$			$

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expenses	Net Expenses (not compensated by insurance or otherwise)	$		
	Enter 5 percent of item 5, page 1, and subtract from Net Expenses			
	Allowable Medical and Dental Expenses. See Instruction for limitation			
Miscellaneous (including alimony, amortizable bond premium, special deduction for the blind, etc.)	Solicitation Exp. directly relating to the improvement & expansion of the business & not recoverable from the Corporation	$		
	Legal fees in re deficiency assessment		574 08	
	Total Miscellaneous Deductions see statements attached			
	TOTAL DEDUCTIONS		7,263 83	9,837 91

TAX COMPUTATION—FOR PERSONS NOT USING TAX TABLE ON PAGE 2

1. Enter amount shown in item 5, page 1. This is your Adjusted Gross Income		$11,716 09
2. Enter DEDUCTIONS (if deductions are itemized above, enter the total of such deductions; if adjusted gross income (line 1, above) is $5,000 or more and deductions are not itemized, enter the standard deduction of $500)		C2,238 05
3. Subtract line 2 from line 1: Enter the difference here. This is your Net Income		$
4. Enter your Surtax Exemptions ($500 for each person listed in item 1, page 1)		11,716 09
5. Subtract line 4 from line 3. Enter the difference here. This is your Surtax Net Income		61,521 96
6. Use the Surtax Table in instruction sheet to figure your Surtax on amount entered on line 5. Enter the amount here		$ 500 00
7. Copy the figure you entered on line 3, above. (If line 3 includes partially tax-exempt interest, see Tax Computation Instructions)		61,021 96
8. Enter your Normal-Tax Exemption ($500 if return includes income of only one person; otherwise see Tax Computation Instructions)		27,580 27
9. Subtract line 8 from line 7, and enter the difference here		61,521 96
10. Enter here 3 percent of line 9. This is your Normal Tax		$ 500 00
11. Add the figures on lines 6 and 10, and enter the total here. (If alternative tax computation is made on separate Schedule D, enter here tax from line 15 of Schedule D)		51,021 96
		$1,530 66
If you used the $500 standard deduction in line 2, disregard lines 12, 13, & 14, and copy on line 15 the same figure you entered on line 11		29,117 13
12. Enter here any income tax payments to a foreign country or U. S. possession (attach Form 1116)	$	
13. Enter here any income tax paid at source on tax-free covenant bond interest		
14 Add the figures on lines 12 and 13 and enter the total here		
15. Subtract line 14 from line 11. Enter the difference here and in item 6, page 1. This is your tax		29,117 13

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that action, and the Commissioner of Internal Revenue was Respondent, Docket 5053, a total deficiency assessment of $15,612.75 was entered, as evidenced by a copy of the stipulation which we offer in evidence as Plaintiff's Exhibit No. 3.

Mr. Gilbert: We have no objection.

(Thereupon the paper was filed in evidence as Plaintiff's Exhibit No. 3.)

Mr. Ferguson:

It is further stipulated that the Plaintiff in this action paid to K. I. McKay, an attorney at Law, at Tampa, Florida, the sum of $7,263.83.

Thereupon the Plaintiff, to maintain the issues on his behalf, then and there produced and caused to be sworn as a witness, EDWARD G. NETSCHER, who testified as follows:

[fol. 22] Testimony of EDWARD G. NETSCHER:

Direct examination.

Questions by Mr. Ferguson:

Q. State your name, please?

A. Edward G. Netscher.

Q. What is your business or profession?

A. I am comptroller for Lykes Brothers, Incorporated, and subsidiary companies.

Q. What is your educational background, in so far as accounting is concerned?

A. I am a Bachelor of Commercial Science, New York University; I am a C.P.A., New York and Florida; and I have been a tax supervisor and public accountant.

Q. Mr. Netscher, did you examine the income tax return filed by the plaintiff in this action for the year 1944?

A. I did.

Q. Did you take the information shown on that return and by giving the necessary consideration to the payment of the sum of $7,263.83 re-compute and calculate the overpayment by the payment during that year, after deducting that amount?

A. I did.
Q. Is this a true and correct calculation?
A. Yes sir; it is.

Mr. Ferguson: We offer that in evidence as Plaintiff's Exhibit No. 4.

[fol. 23] Mr. Gilbert: We have no objection.

(The Computation was filed in evidence as Plaintiff's Exhibit No. 4.)

Mr. Ferguson:

Q. Assuming, Mr. Netscher, that the aforesaid amount paid to Mr. K. I. McKay by the plaintiff in this action on August 30th, 1944, is a proper deduction from income taxes, what amount would the plaintiff be entitled to receive in this action by reason of said payment?
A. $5,665.78.

Mr. Ferguson: That is all.

Cross-examination.

By Mr. Gilbert:

Q. Did you prepare the original and amended returns yourself, Mr. Netscher?
A. No sir. I did not prepare the original return. I prepared the amended return.
Q. And the claim for refund?
A. Yes sir. And the claim for refund.
Q. And made this computation, yourself?
A. Yes sir, I did.

[fol. 24] Redirect examination.

By Mr. Ferguson:

Q. Mr. Netscher, I hand you herewith a series of letters consisting of four, the first dated January 2nd, 1947, the second dated January 13th, 1947, the third dated June 20th, 1947, and the fourth dated October 30th, 1947, and I ask you to examine these and state whether or not you prepared them in connection with this claim for refund which is being sued on in this action?

A. Yes sir. I did.

Q. What happened to the originals?

A. The originals were filed with the officials of the Bureau.

Q. Are those exact copies thereof?

A. They are. One of those I had Mr. Lykes sign. I did not sign it myself.

Mr. Ferguson: We offer those letters in evidence as Plaintiff's Exhibits 5, 6, 7, and 8, in accordance with the dates.

Mr. Gilbert: We would like to object to those, your Honor. These are statements prepared by Mr. Netscher giving his opinion as to the law applicable to the suit here when it was pending before the Bureau, and we believe that is a question for the Court to determine. If the plaintiff wishes to file a brief, that is up to him; but we do not think these are properly admissible in evidence, and they are immaterial.

[fol. 25] By the Court: Is there anything in the letters beyond a statement?

By Mr. Ferguson: I think, if your Honor please, that they are material, because it is an explanation of the claim.

The Court: To that extent they will be received. To the extent that they cover what the law is, the Court will disregard them. If they supplement the facts, they will help us to that extent.

Thereupon the Plaintiff, JOSEPH T. LYKES, to maintain the issues on his own behalf, was then and there duly sworn, and testified as follows:

Direct estimation:

Questions by Mr. Ferguson:

Q. State your name, please sir?

A. Joseph T. Lykes.

Q. You are the Plaintiff in this action, are you?

A. Yes sir.

Q. Mr. Lykes, what is your business or profession?

A. President of Lykes Brothers, Incorporated, and certain of their subsidiary companies.

Q. Mr. Lykes, where were you residing during the year 1940 and the year 1944?

[fol. 26] A. 631 Esplanade, Pelham Manor, New York.

Q. Are you now a citizen and resident of Florida?

A. I am.

Q. And you have been a resident here for the past year or more?

A. Yes sir.

Q. Mr. Lykes, will you please explain to the court the reasons prompting you to make the gifts that you made in 1940 which form the subject of this controversy?

Mr. Steed: If the Court please, at this time the Government objects on two grounds:

In the first place, it is requesting this witness to expand and explain orally the terms of a written instrument, under seal, as evidenced by the gift tax return, and I call the Court's attention to the gift tax return, and would like for the court to look at it. On the reverse side of the gift tax return, your Honor, this witness explained the reason for the gifts. Reading from the return:

250 shares of the common stock of Lykes Brothers, Inc., motive, love; and the same thing as to the other donees, motive, love.

Any explanation, in addition to that, is contrary to every rule of evidence.

By the court: I do not believe I need to hear your argument. I am getting ready to sustain your objection, unless you want to make a speech.

[fol. 27] By Mr. Ferguson: If your Honor please, I do not think the fact that you state one reason in the gift tax return would preclude you from stating any other reason that you may have had, if it is not in contradiction of or in variance with.

By the Court: What is the purpose.

By Mr. Ferguson: The purpose is to show the business purpose connected with the gifts, and to show that it is for protection and conservation.

By the Court: Let me get this point clear: Mr. Lykes gave to his wife and children a thousand shares of Lykes

Brothers stock, and in making a report of that gift he reported the value of that stock at $120.00 a share, and paid the gift tax accordingly on the gifts that he had made to his family. The Government comes along and says the value of that stock as you reported it is in error; that it is worth more than you reported, and the gift tax you owe is more than the amount your paid. Is not that the issue?

Mr. Ferguson: Yes sir, except it is very exaggerated. It is about fifteen times "what you said".

By the Court: Well, it is more than the amount you paid, and Mr. Lykes entered into a contest with the Government over that issue, as to whether or not it was worth more than he paid—it being a stock of no market value in so far as the Exchange is concerned—I do not know whether the record shows that in the case—and he hired an attorney to represent him in that controversy with the Government. Is that right?

[fol. 28] Mr. Ferguson: That is right, sir.

The Court: And the Government is now saying that he is not entitled to that amount that he paid an attorney to represent him in the controversy with the Government over the value of the stock that he gave to his family. Does that state the question?

Mr. Ferguson: Yes sir; but we are contending that we are entitled to that for these additional reasons, as set forth in our complaint:

The business purposes for the giving of this stock, plus the *exorbitant and confiscatory assessment* made by the Government in the sum of a hundred and forty five thousand dollars, when the Government admitted that we did not owe but fifteen thousand dollars. In other words, they asserted against this man ten times what we were required to pay; and this case, as we see it, is entirely different from the ordinary case, where an assertation is reasonable. Here we have got an entirely different state of facts, one where this man was asserted a hundred and forty-five thousand dollars and actually paid fifteen thousand dollars in the final wind up, showing that the *assessment*, in itself, was so arbitrary and confiscatory and unreasonable that it should not have been made.

By the Court: The record that you have introduced shows that.

Mr. Ferguson: It does not show the business purpose behind these gifts.

By the Court: Does the Government contest this case in [fol. 29] any sense of raising the question before this court as to when a man makes a gift and the Government says the gift is reported too low he cannot hire counsel to represent him in the controversy with the Government over that issue?

By Mr. Ferguson: No sir.

The Court: It is not in any sense that way?

Mr. Ferguson: No sir. They are not saying whether we do it or not. What they are saying is that if you did hire and pay counsel then you cannot show that payment as a deduction on your income tax.

The Court: That is what I say. The Government says that you cannot claim it as an expense in your income tax. The gift tax is not involved in this case?

Mr. Ferguson: The gift tax, itself, no sir. The question is, under the peculiar facts and circumstances of this case, is the Plaintiff entitled to claim the amount paid as a deduction on this income tax return.

The Court: Let me ask another question:

Is there any limitation in the law against a man who makes a gift including in his income tax return any expenses that he incurs and that he subsequently incurs in defending a controversy raised by the Government as to the value he places upon——

By Mr. Ferguson: If your Honor please, let me answer that question in this way:

[fol. 30] The basic law, in my opinion, permits that expense to be deducted. The regulation written by the Department, pursuant to the basic law, indicates to the contrary on certain given statements of facts; but the basic law, itself, provides:

Non trade or non business expense, in the case of an individual, all of the ordinary and necessary expense paid or incurred during the taxable year for the production of income, or for the management, conservation or mainte-

nance of property held for the production of income, is a proper deductible expense.

Now, it is our contention, if your Honor please, under the facts which I hope to develop from Mr. Lykes, and as set forth in the Petition, what action he took by reason of the unusual circumstances here shown by the record is clearly within the above provisions for the management, conservation and maintenance of his property, and, as such, deductible for income tax purposes.

The Court: Is it your contention that, under the law, or under any regulation that has been promulgated by the Bureau, that the expense incurred by Mr. Lykes in this case in defending the action brought against him on a deficiency in the tax on the gifts is not a deductible expense in his income tax for specific reasons other than the law.

Mr. Gilbert: No sir. We believe the law, your Honor, as written—as there is no provision in the law for the deduction of attorneys' fees for the gift tax contest, no provision for the deducting of that particular expense—the regula- [fol. 31] tions written by the Commissioner of Internal Revenue that were promulgated by the Secretary of the Treasury in the Revenue Code says that attorneys fees paid for contest of the gift tax is not taxable; and we contend that the gift tax regulations are properly promulgated under the Code.

By the Court: Now, let me ask you this:

You are objecting to the question that has just been propounded to this witness. Does the answer to that question in any way affect the position that the Government is taking in this case with reference to the right of the plaintiff to get the benefit of this payment?

By Mr. Steed: If the Court please, I would like to answer that question:

It does in this respect:

The plaintiff endeavors to recover this money from the Government on the income tax return of 1944, and in such endeavor they have gone off into the reasons why this gift had something to do with the production and maintenance of income.

Even if the law allowed the payment of attorneys' fees as a deduction on his income tax return, this question pro-

pounded to Mr. Lykes is an effort to get him to go into a greater length than he did on his gift tax return in explaining these deductions, which is an enlargement on a written instrument filed by Mr. Lykes, and on the back of the gift tax return, under Schedule A, Description of Gift, and Donee's Name and Address, we have here in the taxpayer's own words the motive for the gift. If we allow the tax- [fol. 32] payer to expand on the motive given in this written statement, under seal, it is against the rule of evidence.

By the Court: Mr. Steed, your own statement makes the Government's contention untenable, and the court so rules.

(Thereupon the question was read to the witness as follows):

Q. Mr. Lykes, will you please explain to the court the reasons prompting you to make the gifts that you made in 1940 which form the subject of this controversy?

A. As indicated on the return, love and affection, of course, was one motive. In addition was a desire to create for the recipients of the gifts an independent status. And, in addition, this is a family company which originally was a partnership and subsequently incorporated in 1910, by a number of brothers, and as the younger brothers, including myself, came of age, and available for work, they were given an interest in the business, and as the years went on, trying to perpetuate the interest, the sons, nephews and sons-in-laws, and it was the accepted custom or policy of the older brothers, as we accumulated some value, to make gifts to our children, first, with the boys in the family to instill interest to carry on, *and to further fortify our remaining interest in the company;* and also to enlist the interest of in-laws, who were husbands of our daughters, as a good business proposition.

Our Company has never had their stock on the market. [fol. 33] In fact, there has been no real market increase or any sale of a substantial amount of stock as far as I know.

So, always, it was the general practice by my brothers, as well as myself, of creating a situation of that kind; and up to date that has had, in our judgment, a beneficial effect, because most of our sons and several of our relatives have become actively engaged in our business and are important officials in the business today.

Q. Mr. Lykes, what effect did that have upon the continuation and soundness of the organization of Lykes Brothers in which you own your stock?

A. Well, it creates, in our judgment, a management of continuity and of more interest than would otherwise be the case, because the availability of stock to disinterested people in our executive branch is not up to date, at least, accessible as a benefit, or as an added inducement, for outside managerial help.

Q. What conditions, Mr. Lykes, about 1940, accentuated managerial problems and brought this more forcibly to your attention, and to the attention of your other brothers?

A. It was a question brought on by the war, and a variation of economic reasons generally, and the fact that the older managing group among the brothers were getting older in age, which rather emphasized the prudence of fortifying our business from a future managerial standpoint.

Q. Mr. Lykes, what is the principal nature of the business [fol. 34] conducted by Lykes Brothers, Incorporated, individually and through subsidiaries?

A. Originally, the cattle business, ranching, packing houses, cattle trading; latterly extending to extensive steamship operations through a subsidiary company, Lykes Brothers Steamship Company, Incorporated, and related industries such as stevedoring operations.

Q. What are the characters of these business-, as relates to hazards, Mr. Lykes?

A. The steamship business is admittedly a very hazardous operation, because it is dependent upon so many factors, international trade and political conditions, as well as economic, and the character of the business is that it runs more or less in cycles, a period of good and a longer bad period.

Q. And the nature of the business is such that it is of the utmost importance that the continuity of management be interested and experienced?

A. Absolutely.

Q. What other factors did occur that confirmed the judgment of yourself and the other brothers to enlist the younger generation to become actively identified and to become interested in the management of the Lykes enterprises?

A. I think it has proved sound, and we have quite a number of our executives today who are interested in the business from an ownership standpoint by virtue of this policy.

Q. Take your own son, for instance, Joseph T. Lykes, Jr., [fol. 35] to whom you made gifts in 1940, did he follow what you thought he would and become identified with the Company?

A. He has been, since his release from the Navy, actively identified in the business, and has taken increased responsibility, and functioning as I hoped he would.

Q. Does he also have any official connection with any of the business?

A. He is a Director today of both the parent company and the Steamship Company.

Q. Mr. Lykes, were there any deaths that ensued in the early part of 1940 that put more responsibility on the younger generation that were brought in under the plan that you testified about?

A. Well, we had several unfortunate losses among our top personnel and those who had been the guiding factors beginning in 1940.

Q. It is true, is it not, that in 1941, Mr. T. M. Lykes, who was directing the ranch operations, died; and in 1942, Mr. H. T. Lykes; and in 1943, Mr. J. M. Lykes, who was then head of the Steamship Company; also died, did they not?

A. That is correct.

Q. And you also, did you not, suffer the loss of the Executive Vice-President of Lykes Brothers, Incorporated, in the death of Mr. Reuben Tipton?

A. Yes sir.

[fol. 36] Q. Mr. Lykes, did you suffer the loss of any executive who was handling the operations in Cuba, also?

A. Yes sir. Mr. F. A. Morris, who was in charge of our Cuban property.

Q. And have the younger Lykes generation taken over and assumed the responsibilities caused by the death of these executives?

A. That is correct.

Q. Mr. Lykes, what were your holdings of Lykes' Brothers common stock of the character that you gave in 1940, during that year, if you know?

A. The character was the common stock.

Q. And what were your holdings?

A. My holdings at the beginning of 1940 were approximately three thousand shares.

Q. And during that year you gave one thousand shares for the reasons that you have indicated?

A. Yes sir.

Q. What were the approximate number that you still owned, after making these gifts in 1940, in the Company?

A. Approximately two thousand.

Q. Have Mr. Morris responsibilities and place been taken over by the second generation, a son-in-law?

A. Yes sir.

[fol. 37] Q. In determining the valuation of the common stock that you gave in 1940, as reported on your gift tax return, how did you arrive at that value?

By Mr. Gilbert: the valuation of stock is not involved, but merely the attorney's fees?

By the Court: I am not so sure, since the case has taken the turn that it has. It might not be important. Let's see how arbitrary that value was, as made. Objection overruled.

A. I took, as a guide, the value that had been placed on the only arms length transaction of importance during that year of which we had knowledge, which was the sale of a number of shares, several hundred, as I recollect, by Mr. Morris, who was identified with the Company, and practically in control of our Cuban business, to other executives of the Company.

Q. Did you also take into consideration the financial statements, with which you were familiar, and other considerations arising from the business?

A. The hazards and the business appraisal, that might be a fair valuation; and the primary consideration I think was establishing its market value as nearly as we could.

Q. Mr. Lykes, what are your present holdings, approximately, in Lykes Brothers, of the class of stock that you gave?

A. Approximately eighteen hundred shares.

Q. Mr. Lykes, you have heard the stipulation of counsel that you paid Mr. K. I. McKay, on August 30th, 1944, the

[fol. 38] sum of $7,263.83, as evidenced by your check and memorandum on the stub. Will you please tell the Court why you paid Mr. McKay that sum of money?

A. Well, what brought about the necessity was a ninety day letter on the valuation placed by the Government, and the tax involved, and which,

No. 1. I was not in a position to pay because practically all of my assets were in this stock.

Secondly. I was convinced that it was an arbitrary figure which could, in no manner or reason, by any business standards with which I was aware, have been maintained. It was practically confiscation, in my judgment. I would not like to express my feelings when I first got it. It might not be appropriate here. But, in any event, it just became necessary for me to get some relief, and, of course, the only way I thought I could get relief was for me to adopt the course I did, which was to get legal help. And, then, also involved was my whole estate. If, at that time, I had accepted the Government's *proposed assessment,* to meet that situation I would have had to sell more of the stock, which, as far as I knew, at the price I could get, would mean the wrecking practically, of my holdings in the Company, which, naturally, I wanted to avoid.

By the Court:

Q. The question is: *Did you hire Mr. McKay to represent you in the controversy with the Government over the assessment that they had imposed upon you in connection with the gifts?*

[fol. 39] A. The *assessment itself was a consideration,* but I was *not prepared to pay such assessment,* and also for the protection of my assets.

By the Court:

Q. The question is: Did you hire Mr. McKay to represent you in connection with the matter?

A. Yes sir, and all things connected therewith.

By the Court:

Q. And the money that you paid Mr. McKay is exclusively applicable to his representation of you in this controversy?

A. Correct.

By the Court: That is the point I wanted to clear up in the record.

Cross-examination.

By Mr. Gilbert:

Q. Would you tell us, Mr. Lykes, how many shares of this Class B common stock were outstanding in 1940?

A. You mean total?

Q. Yes sir. Is it correct that there were twenty-five thousand shares outstanding at that time?

A. I think so. It was approximately that.

Q. At the time you made the gifts there were twenty-five thousand shares outstanding?

[fol. 40] A. Yes sir; I would say so.

Q. And you, I believe, testified that you had three thousand shares, yourself, at that time?

A. That is correct.

Q. It is correct that you gave 250 shares to your wife, Margaret K. Lykes?

A. Yes sir.

Q. And 250 shares to your daughter, Margaret H. Lykes?

A. Yes sir.

Q. And 250 shares to your daughter, Margaret L. Lykes?

A. Yes sir.

Q. And 250 shares to your son, Joseph T. Lykes, Jr.?

A. Yes sir.

Q. You thus gave only one per cent of this stock to each one of your wife, daughters and son, is that correct?

A. Yes sir.

Q. It is true, is it not, that your two daughters and your son were all three minors at that time?

A. In 1940 I don't think they were all minors. My son, I think, in 1940 was 21. I think he became 21 in 1940.

Q. This was early in the year 1940?

[fol. 41] A. He was practically grown. He was in his last year of college.

Q. He was nearly 21?

A. At the date of the gift I think he was under 21, to be specific.

Q. The two daughters and the son were under 21 at that time?

A. No sir. I think my oldest daughter was 21, but the other two were under 21.

Q. All three, the two daughters and your son, lived with you at 631 Esplanade, Pelham Manor, New York?

A. That is true.

Q. Your son did not take any part in the business until he got out of the Navy, I believe you testified?

A. No sir. He worked during the Summers, but he had no continuous participation in the Company; but he worked during the Summers prior thereto.

Q. It was just a Summer job?

A. Learning the business.

Q. He was not present at your stockholders' meetings, was he?

A. No sir.

Q. You first learned of this proposed deficiency, I believe you testified by this ninety day letter, which was issued in March, 1944; is that correct?

A. That is correct.

[fol. 42] Q. And you did not make any gifts of this stock between the time that these thousand shares were given, in February, 1940, to March, 1944, did you?

A. I don't know. I will have to refer to the records to be accurate, if I may.

There were no gifts. I made no gifts during the years 1941, 1942 and 1943.

Q. Mr. Lykes, your wife and your two daughters did not take any active part in this Corporation's management after you made these gifts of stock to them, did they?

A. That is correct.

Q. They did not?

A. They did not.

Q. When did your son get out of the Navy?

A. He went in the Navy in 1941 and I think he was out in 1945.

(Thereupon the plaintiff announced that he rested his case.)

The Court: Do you have any testimony?

Mr. Gilbert: We have no testimony, your Honor.

The Court: The court will take this case under advisement. You gentlemen, I suppose, would rather file briefs.

Mr. Ferguson: I would like to, your Honor.

The Court: How long would you gentlemen want for [fol. 43] your briefs? You may have two weeks after you get the testimony from the Reporter, Mr. Ferguson, and you may have the same time for the Government.

I find that it is beneficial to the Court in all cases to have counsel for both sides file their briefs with me at the same time, and I get straight out reaction to the law in question; and I will give you both ten days after you receive each other's brief to file a reply; and two weeks after the receipt of the transcript. If you need more I can give it to you. Sometimes you people that work for the Government are in a jam.

Ten days after the receipt of the transcript.

Mr. Gilbert: We were prepared to argue it this morning, your Honor.

The Court: If there is any particular matter that you want to argue, I will listen to you; but I think I would like to have a brief. I could not decide it without checking the testimony.

Reporter's Certificate (omitted in printing)

[fol. 44] IN UNITED STATES DISTRICT COURT

MEMORANDUM DECISION—Filed June 8, 1949

This is a suit to recover an alleged overpayment of income taxes for the year, 1944. The question presented is whether, under Section 23(a)(2) of the Internal Revenue Code, attorney's fees paid by the taxpayer in the year 1944 in the determination of his gift tax liability for the year 1940 are allowable as a deduction from his gross income. The evidence in the case is not in dispute.

Plaintiff is and has been for many years a stockholder in Lykes Brother, Inc., a family corporation. The stock of he corporation has been closely held throughout its exist-

ence and there is not nor has there ever been an open market price for the stock. In the year 1940 plaintiff made gifts of 1000 shares of stock of the corporation, owned by him, to members of his family, as follows:

250 shares to Margaret K. Lykes, his wife;
250 shares to Margaret H. Lykes, his daughter;
250 shares to Elizabeth L. Lykes, his daughter;
250 shares to Joseph T. Lykes, Jr., his son.

It appears from the testimony that one of the daughters had reached her majority at the time of the gifts, but the other two children were minors. All of the children made their home with the taxpayer, were unmarried and neither the wife nor the children took any part in the management of the business of Lykes Brother, Inc., at the time of the gifts.

[fol. 45] The motive for the gifts, as stated in the taxpayer's gift tax return, was love. The taxpayer testified to additional motives, the principal of which was the accepted custom or policy of himself and his brothers to make such gifts to their children to insure continuity of the ownership and management of the company. The evidence shows this custom had been pursued by other members of the Lykes family, who were blessed with children.

At the time the gift tax return was filed taxpayer valued the stock at $120.00 per share and paid a gift tax thereon in the sum of $13,032.75. The taxpayer testified he took as a guide in determining the value of the stock the only arm's-length transaction of importance during that year, of which he had knowledge which was the sale of several hundres shares by an executive (not a member of the Lykes family) to other executives of the company. He testified he also took into consideration the hazards then confronting the business and reached the conclusion that the market value established by the sale represented the fair value of the stock at the time.

On March 3, 1944 the Commissioner of Internal Revenue formally notified taxpayer that a determination of his gift tax liability for 1940 disclosed a deficiency of $145,276.50 and a deficiency in that amount was assessed against taxpayer. He also was notified of his right to petition the tax court for a redetermination of such deficiency liability.

Taxpayer engaged K. I. McKay to represent him in this matter and a Petition for Re-determination of the liability was filed with the tax court. After taxpayer's attorney had prepared and filed such Petition and prepared his case for trial, a compromise settlement was reached and the Tax Court, pursuant to stipulation of the parties, found a deficiency in taxpayer's gift tax return in the sum of $15,[fol. 46] 612.75, which was promptly paid. The taxpayer paid his attorney $7,263.83 in the year 1944 for services in this matter. No question is raised as to the reasonableness of the amount paid for the services rendered. If the payment is a deductible expense from gross income for the year, as taxpayer claims, he is entitled to recover $5,665.78 with interest in this case.

The taxpayer claims that the payment of $7,263.83 as attorney's fees was an allowable deduction under Section 23(a)(2) of the Internal Revenue Code in as much as the payment was an "ordinary and necessary expense paid or incurred during the taxable year . * * * for the management, conservation or maintenance of property held for the production of income." He contends the payment was made, not as the result of an ordinary contest concerning the valuation of ordinary personal gifts, but that it was a payment of legal expenses incurred to forestall the collection by the Government of an assessment of a tax which was so clearly arbitrary and capricious that in fact, it had nothing to do with the gift on which it was based. He contends further that had it been successfully enforced against him it would have substantially destroyed his holdings in Lykes Brothers, Inc., and would have confiscated most of the property held by him for the production of income.

The Commissioner contends that the law of the case is clearly stated in Treasury Regulation 111, Section 29.23(a) 15(b) as amended by TD 5513. This Regulation provides that expenses paid or incurred by an individual in the determination of gift tax liability, with certain exceptions not applicable here, are not deductible from gross income, even though property held by taxpayer for the production of income must be sold to satisfy an assessment for such tax liability. It is well established that such Treasury Regula-[fol. 47] tions have the force and effect of law if not in conflict with expressed statutory provisions. Maryland

Casualty Company v. U. S., 251 U. S., 342; U. S. v. Grimaud, 220 U. S., 506.

Section 23(a)(2) of the Internal Revenue Code, relied upon by taxpayer, provides:

> "Deductions from gross income. In computing net income there shall be allowed as deductions:
>
> (2) Non-trade or non-business expenses. In the case of an individual, all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income."

There is no statute specifically allowing or prohibiting deductions from gross income of attorneys' fees for services rendered in relation to advice or litigation in respect of any Internal Revenue taxes.

Treasury Regulation III, Section 29.23(a)-15(b), as amended by T. D. 5513, relied upon by Commissioner, provides:

> "Expenses paid or incurred by an individual in the determination of liability for taxes upon his income are deductible. If property is held by an individual for the production of income, amounts expended in determining a property tax imposed with respect to such property during the period when so held are deductible. Expenses paid or incurred by an individual in determining or contesting any liability asserted against him do not become deductible, however, by reason of the fact that property held by him for the production of income may be required to be used or sold for the purpose of satisfying such liability. Thus, expenses paid or incurred by an individual in the determination of gift tax liability, except to the extent that such expenses are al- [fol. 48] locable to interest on a refund of gift taxes, are not deductible, even though property held by him for the production of income must be sold to satisfy an assessment for such tax liability or even though, in the event of a claim for refund, the amount received will be held by him for the production of income."

The only Appellate Court decision bearing upon the precise question here presented is Cobb v. Commissioner of Internal Revenue, decided by the U. S. Court of Appeals, Sixth Circuit, April 4, 1949. That court held that under the stipulated and undisputed facts in that case the attorney's fees there paid were not deductible. That case came to the Court of Appeals from a decision of the Tax Court which had also disallowed the deduction. The taxpayer in that case, as does the taxpayer here, relied upon Bingham et al. v. Commissioner of Internal Revenue, 325 U. S. 365, as supporting his position for the deduction. In the Cobb case the Court of Appeals held that the Bingham case was not controlling and went to considerable pains to point out its reasons for so holding. This court has carefully reviewed these reasons, but finds itself unable to follow them.

This case presents the question, in relationship of the sovereign with its subjects, as to whether Congress has dealt justly with the taxpayer. Congress has imposed gift taxes and has authorized the Commissioner of Internal Revenue to assess an additional gift tax when, in his opinion, there is a deficiency in the gift tax paid by the taxpayer. The Commissioner may do this without giving the taxpayer an opportunity to be heard and the deficiency tax so imposed becomes final upon the taxpayer unless the procedure prescribed by the law is followed, as was done in this case.

To construe the law as giving to the Commissioner the power to assess a taxpayer with a deficiency tax greatly in [fol. 49] excess of what he owes and to hold that such law denies to the taxpayer the right to contest such assessment, except at his own personal expense, just isn't justice under the law. The statute in question gives the Commissioner no such power and the courts should not permit the Commissioner to write such power into the law by a regulation adopted by him.

The inconsistency of this Treasury Regulation is illustrated by the fact that while it denies the right of the taxpayer to deduct expenses paid or incurred in the determination of a gift tax assessment it authorizes the deduction of expenses incurred in litigation to determine whether the expenses paid or incurred in the gift tax assessment are deductible.

In this connection it is noted that in the Bingham case

the same position was taken by the Commissioner as is here taken; that is, that a Treasury Regulation prohibited the deduction.

The Supreme Court in the Bingham case, said:

> "So far as this regulation purports to deny deductions of litigation expenses unless it is to produce income it is not in conformity with the statute X X X."

This court has reached the opinion that this is also true in this case and the court finds and holds that the Treasury Regulation is in conflict with the expressed stautory provision authorizing the deduction.

A Judgment will be entered in favor of the taxpayer, in conformity with this Memorandum Decision.

Dated at Tallahassee, Florida, this 3rd day of June, 1949.

(S.) Dozier A. Devane, United States District Judge.

[fol. 50] IN UNITED STATES DISTRICT COURT

JUDGMENT—Filed November 15, 1949

The court having filed herein its memorandum opinion directing the entry of judgment in favor of the plaintiff and against the defendant; it is

Adjudged that the plaintiff, Joseph T. Lykes do have and recover of the defendant The United States of America, the sum of $5,665.78 with interest as provided by law.

Dated this 8th day of June, 1949.

By the Court.

Edwin R. Williams, Clerk, by Joe A. Law, D. C.

The clerk of the above court is hereby directed to enter a judgment in this case in accordance with my memorandum decision of June 3, 1949 in the above form.

Dated this 14th day of November, 1949.

Dozier A. Devane, United States District Judge.

Before me this 14th day of November, 1949. ——

——, District Judge.

[fol. 51] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed January 14, 1950

Notice is hereby given that the United States of America, defendant above named, hereby appeals to the Circuit Court of Appeals for the Fifth Circuit from the judgment entered in this action on the 14th day of November, 1949.

Arthur L. Steed, Assistant United States Attorney, Attorney for Appellant, United States of America, 308 Post Office Building, Tampa, Florida.

IN UNITED STATES DISTRICT COURT

AMENDED NOTICE OF APPEAL—Filed February 23, 1950

Notice is hereby given that the United States of America, defendant above named, hereby appeals to the Circuit Court of Appeals for the Fifth Circuit from the Judgment entered in this action on the 14th day of November, 1949, and filed on the 15th day of November, 1949.

(S.) Arthur L. Steed, Assistant United States Attorney, Attorney for Appellant, United States of America, 308 Post Office Building, Tampa, Florida.

[fol. 52] Motion for Extension of Time to File Record and Order Granting Same (Omitted in Printing)

[fol. 53] STIPULATION OF RECORD ON APPEAL—(Omitted in Printing)

[fols. 54-56] MOTION FOR TRANSMITTAL OF ORIGINAL EXHIBITS AND ORDER THEREON—(Omitted in Printing)

[fol. 57] CLERK'S CERTIFICATE—(Omitted in Printing)

[fol. 58] That thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of March 12, 1951

No. 13156

UNITED STATES OF AMERICA

versus

JOSEPH T. LYKES

On this day this cause was called, and after argument by Francis W. Sams, Esq., Special Assistant to the Attorney General, for appellant, and George W. Erickson, Esq., for appellee, was submitted to the Court.

[fol. 59] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 13,156

UNITED STATES OF AMERICA, Appellant,

versus

JOSEPH T. LYKES, Appellee

Appeal from the United States District Court for the Southern District of Florida

April 27, 1951

Before Holmes, McCord and Strum, Circuit Judges

OPINION OF THE COURT.—Filed April 27, 1951

Strum, Circuit Judge: This is a suit to recover an alleged overpayment of income tax for the year 1944. The controlling question is whether, in computing the plaintiff-taxpayer's income tax for 1944 he is entitled under 26 U.S.C.A. 23(a) (2) to deduct from gross income the amount he paid

in that year as attorney's fees in contesting with the Commissioner of Internal Revenue the amount of plaintiff's gift tax liability for 1940. Judgment below was for the taxpayer.

[fol. 60] In 1940, plaintiff Joseph T. Lykes was the principal stockholder in Lykes Brothers, Inc., a closely held family corporation organized in 1910 by his elder brothers, engaged in the cattle and meat packing business. Through a subsidiary it also operates extensive steamship lines. In 1940, plaintiff made gifts aggregating 1000 shares of stock in said corporation to his wife, two daughters and a son, giving to each 250 shares. The gifts represented about one-third of plaintiff's holdings in the company. He retained the remaining two-thirds. The son and one daughter were minors. The other daughter had reached her majority. The three children were unmarried and lived with plaintiff. Previous to the gifts, they had taken no active interest in the management of the corporation's affairs. Whether they did so thereafter, does not appear.

As the stock was closely held by the Lykes' family, it had no established market value. In his gift tax return plaintiff valued it at $120 per share, which he considered a fair value, and paid thereon a gift tax of $13,032.75. The Commissioner disagreed, and on March 3, 1944 entered a deficiency assessment of $145,276.50, based upon the Commissioner's valuation. Plaintiff testified that had he been required to pay the deficiency, it would have been necessary for him to raise the money by disposing of a large part of his remaining holdings in the company, property which he held for the production of income.

Plaintiff engaged the services of an attorney who contested the deficiency assessment in the Tax Court of the United States, with the result that the assessment was settled before trial for $15,612.75, about eleven per cent of the sum originally demanded. In 1944, plaintiff paid his [fol. 61] attorney $7,263.83 for these services, but did not deduct this sum from gross income in reporting his income tax liability for that year. He later submitted a claim for refund, based upon a re-computation with the attorney's fees deducted, which claim was denied. If the fee is deductible, plaintiff's income tax for 1944 has been over paid by $5,655.78, which he would be entitled to recover.

At the trial, plaintiff testified that his motive for the gifts

was not only "love," as stated in the gift tax return, but an additional motive was to fortify the value of his retained stock by giving the younger generation an interest in the corporation, thus ensuring continuity in family ownership and management of the corporation, a practice followed by his elder brothers who organized the corporation.

Plaintiff contends that the attorney's fee is deductible from gross income, first, because the gifts were not a mere distribution of property in the ordinary sense but involved calculated business considerations, one of the purposes of the gifts being the strengthening and enhancement of the stock retained by plaintiff, so that the attorney's fee paid for contesting the deficiency assessment was an ordinary and necessary expense incurred in the "conservation" of his income producing property. Second, that the controversy between the Commissioner and plaintiff arose out of an effort by the United States to collect a deficiency assessment which was so disproportionate as to have no reasonable relation to the gifts, but was essentially a hazard to plaintiff's remaining stock in the corporation, a substantial part of which he would have had to dispose of in order to raise the money to pay the assessment.

[fol. 62] Plaintiff relies upon section 23(a) (2) of the Internal Revenue Code, 26 U.S.C.A. 23(a) (2), which provides that in computing net income for income tax purposes, there may be deducted from the gross income of an individual "all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the management, conservation or maintenance of property held for the production of income." If plaintiff is entitled to deduct these fees from his gross income, he must establish that right under the statutory provisions just quoted, as there is no specific statutory provision on the subject.

The subject is dealt with, however, in Treasury Regulation 111, section 29.23(a)-15(b), as amended,[1] which has

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[1] "Expenses paid or incurred by an individual in the determination of liability for taxes upon his income are deductible. If the property is held by an individual for the production of income, amounts expended in determining a property tax imposed with respect to such property during the period when so held are deductible. Expenses paid or

the force and effect of law unless in conflict with the statute itself,[2] and which holds that the deduction here sought is unauthorized. The trial court held that insofar as this regulation purports to deny the deduction here in question it is in conflict with the statute, and hence invalid.

[fol. 63] As section 23(a) (2), supra, deals with exemptions, it is to be strictly construed. *New Colonial Company v. Helvering*, 292 U.S. 435, 440, 78 L. Ed. 1348, 1352.

The questions here involved were recently considered in *Cobb v. Commissioner*, 173 Fed. (2) 711, and determined adversely to plaintiff's contentions here. There is no tenable distinction in principle between this and the Cobb case, with which we are in accord. The *Cobb* case also clearly distinguishes the *Bingham* case, 325 U.S. 365, 89 L. Ed. 1670, here relied upon by plaintiff, which involved the deductibility of legal fees and expenses paid by the trustee of the Bingham trust estate in contesting a deficiency assessment of *income* tax which was a direct lien against the corpus of the trust, and for legal advice relating to tax and other problems arising in the management and distribution of the trust estate, functions which the trustees were under a duty to perform, and which bore directly

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incurred by an individual in determining or contesting any liability asserted against him do not become deductible, however, by reason of the fact that property held by him for the production of income may be required to be used or sold for the purpose of satisfying such liability. *Thus, expenses paid or incurred by an individual in the determination of gift tax liability, except to the extent that such expenses are allocable to interest on a refund of gift taxes, are not deductible, even though property held by him for the production of income must be sold to satisfy an assessment for such tax liability* or even though, in event of a claim for refund, the amount received will be held by him for the production of income." As amended by Treasury Decision No. 5513. (Italics supplied).

[2] *Maryland Casualty Co. v. U. S.*, 251 U.S. 342, 349, 64 L. Ed. 297, 302; *Detroit Ferry Co. v. Woodworth*, (CA-6) 115 Fed. (2) 795, 797, cert. den. 312 U.S. 692, 85 L. Ed. 1128; *Houston Textile Co. v. Commissioner* (CA-5) 173 Fed. (2) 464; *Faucus Machine Co. v. Gage*, 280 U.S. 327, 74 L. Ed. 457.

upon the trust property held for income purposes. Here, the expense was the result of gratuitous personal gifts which the donor was under no duty to make, the effect of which upon his income producing property was at best indirect, remote and hypothetical.

Not all expenses are deductible under section 23(a) (2), *supra*, but only those which are "ordinary and necessary" and which bear a reasonable and proximate relation to the production of income or to the management, conservation or maintenance of property held for the production of income.[3]

As held in the Cobb case, *supra*, the true criterion is [fol. 64] that to become deductible under section 23(a) (2), the expense must be in proximate relation to the production or collection of income, or to the management, conservation or maintenance of property held for the production of income. *Kornhauser v. U. S.*, 276 U.S. 145, 72 L. Ed. 505. Even if the attorney's services in contesting and procuring a settlement of liability for the gift tax deficiency here in question conferred an indirect benefit upon the taxpayer by avoiding a possible sacrifice of income producing property in order to satisfy the lien, such expense is not one directly incurred in managing or conserving such property, nor is it a proximate result of holding property for the production of income, any more than fees or expenses incurred in any other type of personal, as distinguished from business, litigation (e.g. an ordinary tort action) which might result in a lien upon the taxpayer's income producing property. Expenses of this type do not satisfy the requirements of section 23(a) (2) because they are only indirectly, not proximately, related to the management and conservation of the taxpayer's income producing property.

Treasury Regulation 111, section 29.23 (a)-15(b), as amended, is not in conflict with section 23(a) (2) of the Internal Revenue Code, but is a reasonable and consistent interpretation thereof in the respect here under consideration. It is therefore valid and controlling. It denies the deduction here claimed by the plaintiff.

In view of the great disparity in this deficiency assess-

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[3] Cf. as to allowable deductions, *Kornhauser v. U. S.*, 276 U.S. 145, 72 L. Ed. 505; *Commissioner v. Heininger*, 320 U.S. 467, 88 L. Ed. 171.

ment, as indicated by the comparatively modest sum accepted in settlement, it is not difficult to understand the trial court's view that to deny this deduction "just isn't justice under the law." But the principles of broad substantial justice and statutory tax law do not always coin-
[fol. 65] cide. Nor do exemptions for income tax purposes turn upon general equitable considerations. *Deputy v. duPont*, 308 U.S. 488, 493, 84 L. Ed. 416, 421.

Appellee's motion to dismiss the appeal, because filed one day late, is denied. On November 14, 1949, the District Judge made an order directing the Clerk to enter judgment in accordance with his memorandum decision of June 3, 1949. That order, together with the judgment, were filed in the Clerk's office on November 15, 1949. The judgment speaks as of the date of filing with the Clerk. Notice of entry of appeal was filed January 14, 1950, which was "within 60 days" from the entry of judgment. 28 U.S.C.A. 2107.

For the reasons stated, the judgment appealed from is Reversed.

[fol. 66] JUDGMENT

Extract from the Minutes of April 27, 1951

No. 13156

UNITED STATES OF AMERICA

versus

JOSEPH T. LYKES

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby reversed.

[fol. 67] Clerk's Certificate

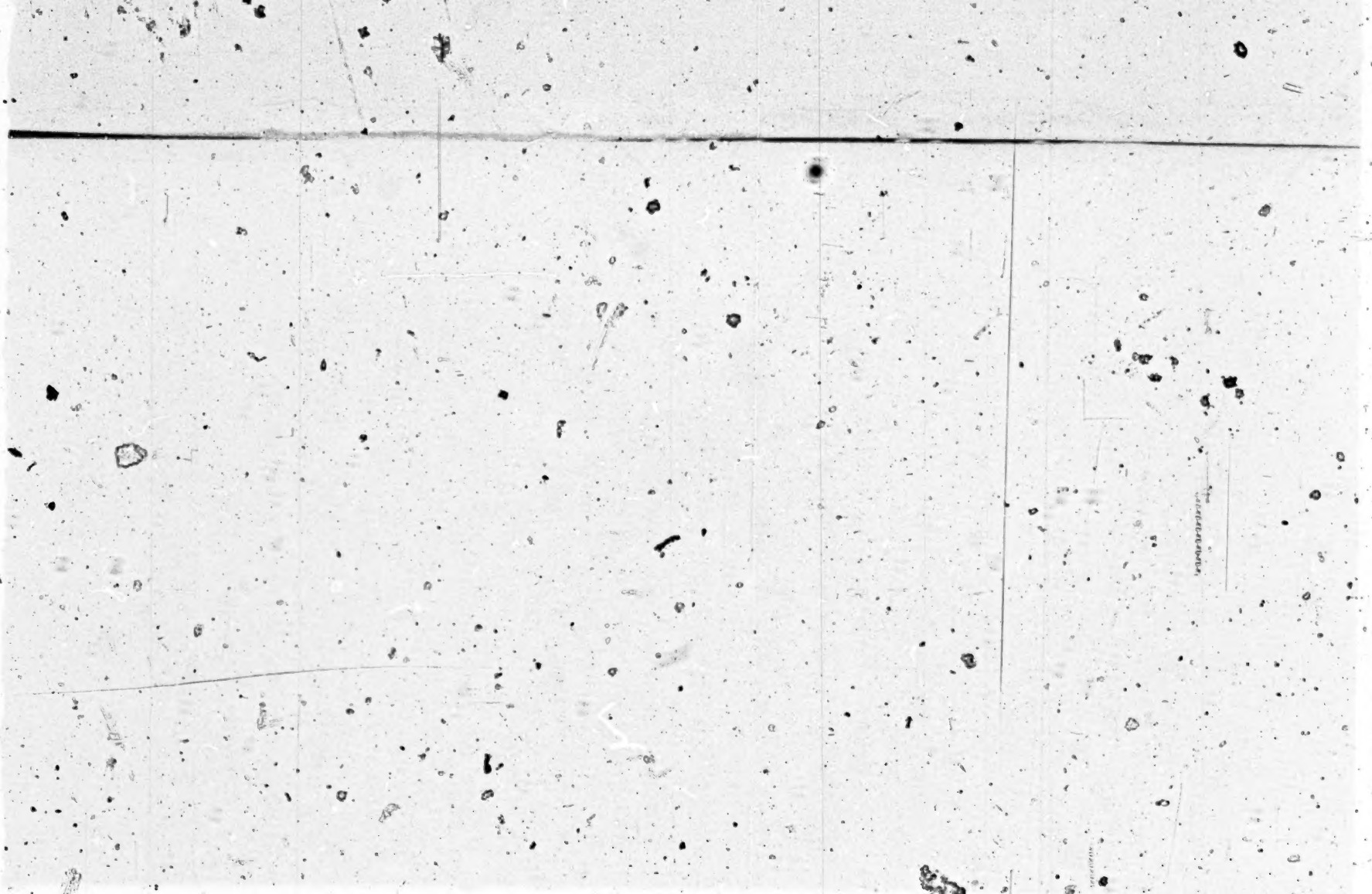
United States of America
United States Court of Appeals, Fifth Circuit

I, Oakley F. Dodd, Clerk of the United States Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 58 to 66 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Court of Appeals, for the Fifth Circuit, in a certain cause in said Court, numbered 13156, wherein United States of America is appellant and Joseph T. Lykes, is appellee, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 57 are identical with the printed record upon which said cause was heard and decided in the said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 2nd day of May, A. D. 1951.

Oakley F. Dodd, Clerk of the United States Court of Appeals, Fifth Circuit. (Seal.)



[fol. 65] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

No. 173

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed October 8, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.